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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1991

Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, Ron Severt and Tammy Silvey,

Petitioners,

v.

The Dayton Women's Health Center, Inc., K. W. Davis, Md., and Robert Skipton, Md.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Ohio

Of Counsel
THOMAS E. GROSSMANN
1800 Star Bank Center
Cincinnati, OH 45202
(513) 381-2838

TRACY LOUISE WINN
National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242

Counsel of Record
ROBERT K. SKOLROOD
National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242

QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly, picketing, leafleting and other free speech activity on public sidewalks, streets, and easements.

2. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly, picketing, leafleting and other free speech activity on private property, which those engaging in such constitutionally protected speech either own or have permission to be upon, but which is not owned by Respondents.

3. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, have not acted in concert with named defendants, have not received notice of the underlying litigation, and have had no opportunity to be heard to present individual unique defenses before they are enjoined.

4. Whether it is a violation of due process rights to preclude non-parties and absent defendant class members from challenging the constitutionality of an injunction against them or an invalid defendant class certification on the basis of preclusion doctrines such as *res judicata*, collateral estoppel, or the "law of the case," when the non-parties received no notice of the underlying litigation and were inadequately represented in it.

5. Whether an injunction that imposes restrictions on otherwise lawful expressive activity in public places conflicts with the doctrine of prior restraint.

LIST OF PARTIES

The parties to the proceedings are Petitioners Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, Ron Severt and Tammy Silvey.

The Respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD., and Robert Skipton, MD.

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Respondents.

Petition For A Writ Of Certiorari To
The Court Of Appeals For Montgomery County, Ohio

The Petitioners Cheryl Sorrell, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for Montgomery County entered in *Dayton Women's Health Center v. Enix* on August 21, 1990 affirming the decisions rendered by the Common Pleas Court for Montgomery County on March 14 and June 6, 1989. The Supreme Court of Ohio declined to hear the case on January 22, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District, styled *Dayton Women's Health Center v. Enix* of August 27, 1992, is unreported. It is reprinted in the Appendix, pp. 69 - 85.

The decision of the Common Pleas Court for Montgomery County, Ohio of March 14, 1989 which ordered a permanent injunction against the Petitioners and the defendant class is unreported. It is reprinted in the Appendix, pp. 55 - 56.

Other decisions rendered in this case include the decisions of the Common Pleas Court for Montgomery County, Ohio of (1) June 6, 1989 finding Petitioner Tammy Silvey in contempt of court, (2) July 10, 1987 ordering a permanent injunction against the the original named defendants and the defendant class, (3) March 16, 1987 modifying the order of January 15, 1987 and (4) January 15, 1987 certifying the defendant class and issuing a preliminary injunction against the original named defendants and the defendant class. All of which are unreported and are reprinted in the Appendix, on pages 67 - 68, 13 - 18, 8 - 12, 1 - 7 respectively.

The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District of December 5, 1988 affirming the lower court's decision is unreported. It is printed in the Appendix, p. 19 - 33.

The appeal to the the Supreme Court of Ohio of the interlocutory order, reported in 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990) is reprinted in the Appendix, p. 35 - 52.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

The order of the Supreme Court of Ohio denying review of the Court of Appeals of Montgomery County, Ohio decision rendered on August 27, 1991 was issued on January 22, 1992. This petition has been filed within ninety days of the entry of the

order by the Ohio Supreme Court denying review of the lower court's decision.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises issues under the Free Speech Clause of the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In addition, this case raises issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution which provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from decisions rendered by the Common Pleas Court for Montgomery County, Ohio on March 14 and June 6, 1989 and affirmed by the Second Appellate District on August 27, 1991.

A. Procedural Posture

On October 14, 1986, Plaintiffs-Respondents ("Respondents")[1] filed a complaint requesting injunctive relief against the original named defendants[2] and a defendant class. On January 15, 1987, the trial court certified a defendant class defined as "all individuals protesting the activities conducted at The Dayton Women's Health Center ," and the original named defendants were ordered to represent the class. A permanent injunction was issued against the defendant class on July 10, 1987.

After the permanent injunction was issued, the original named defendants appealed the injunction and the class certification issues. On December 5, 1988, the Second Appellate District Court of Ohio modified the permanent injunction and determined that the appeal of the class certification issues had been forfeited by the failure of the named defendants to immediately appeal the order of January 15, 1987 certifying the class. *Dayton Women's Health Center v. Enix*, No. 10579 (Montgomery Co., December 5, 1988). Pursuant to Ohio Rev. Code Sec. 2501.12, an order certifying the case for review by the Supreme Court of Ohio was issued on the question of whether defendant class certifications are appealable orders which must be immediately appealed. The Supreme Court of Ohio affirmed the appellate court's decision on that issue without addressing

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1. Respondents are The Dayton Women's Health Center ("DWHC"), Dr. Davis and Dr. Skipton.

2. The original named defendants were David Enix, James Mehaffie, David Mehaffie, Douglass Sapp, Kym Mehaffie and H.F. Perkins.

the other constitutional questions raised. *Dayton Women's Health Center v. Enix*, 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990).

On January 20, 1989, while the original appeal of this case was pending, Respondents filed citations of contempt against the six original named defendants, the Petitioners in this case, and six other alleged members of the defendant class.[3] A total of over 268 separate contempt citations were filed for conduct occurring over a period of a year and a half. The citations were tried from February 9 to February 15, 1989. On March 14, 1989, the trial court found that 10 of the 18 individuals were in contempt of court on 18 of the citations. The remaining 250 citations were dismissed. Although each individual found guilty of contempt was fined $500 for each citation, the fines were suspended.

In its March 14, 1989 judgment, the trial court also issued additional restrictions upon the class.[4] Subsequently, Petitioner

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3. Members of the defendant class who were not original parties to this litigation, but who were charged with contempt include Petitioners, Tammy Silvey, Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, and Ron Severt; and non-parties: Dawn Thomas, Mindy Berry, Bruce Moore, Mary Gigandet, Lori DeLane and Corina Sumner.

4. The new injunction prohibits the Petitioners and the defendant class from :
   1. Blocking or interfering with the access or egress of any individual going to or from . . . [DWHC];
   2. Blocking or interfering with the driveway of . . . [DWHC];
   3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
   4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk their horns, including hand and arm signals;
   5. Speaking, chanting, yelling or *mechanically* communicating in any manner designed or intended to reach the staff or patients or volunteers inside . . . [DWHC]or patients or volunteers inside . . . [DWHC], or in such a volume that it is reasonably apparent that the communications are likely to be heard by the staff or patients or volunteers inside . . . [DWHC];
   6. Trespassing on the property of . . . [DWHC];
   7. *Picketing in any form, including parking, parading, or demonstrating which is limited to homes of patients, employees, staff, or volunteers of The Dayton Women's Health Center or the physicians performing services at the . . . [DWHC]*;

Tammy Silvey was accused of violating the March 14, 1989 injunction for conduct on April 25, 1989. On June 2, 1989 a hearing was held on this charge. On June 6, 1989, the trial court found Silvey in contempt and ordered her to pay a $500 fine plus the suspended fines imposed against her in the March 14, 1989 order.

Petitioners appealed the trial court's March 14 and June 6, 1989 judgments. Petitioner Silvey appealed her contempt convictions and the other Petitioners appealed the injunction issued against them. On August 27, 1991, the Second Appellate District Court affirmed the trial court's judgments.

The Appellate Court refused to address Petitioners' challenge to the propriety of the defendant class certification and injunction holding that the right to appeal those issues had been forfeited by the original class representatives' failure to file an immediate appeal of the class certification order. The Appellate Court also held that Petitioners could not challenge the constitutionality of the injunction against them insofar as similar issues had been previously determined by the Appellate Court. Consequently, the Appellate Court refused to address Petitioners' challenges to the constitutionality of the injunction.

Petitioners appealed this decision to the Supreme Court of Ohio. The Ohio Supreme Court refused to hear the case.

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8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at . . . [DWHC] in groups of more than five individuals;
9. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of . . .[DWHC];
10. Picketing in any form including parking, parading or demonstrating within the viewing distance of . . . [DWHC] at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility, *more specifically, between the south side of the driveway just north of the clinic building and the north side of the driveway just south of the clinic building;*
11. Picketing in any form including parking, parading or demonstrating within the viewing distance of . . . [DWHC] in groups of more than ten (10) individuals.

(March 14, 1989 order [emphasis added]. The italicized portions in the above paragraphs of the injunction identify additions or modifications to the July 10, 1987 injunction.)

B. Statement of Facts

DWHC is an abortion clinic located in a commercial area in Dayton, Ohio. The other two Respondents are employed at DWHC and have a private office elsewhere. DWHC is housed in a three-story building that is approximately 70 feet from the public street and the sidewalk it faces. The building is owned by DWHC's director. DWHC occupies the top two floors.

Since the trial court's permanent injunction was issued on July 10, 1987, Petitioners on occasion have engaged in peaceful constitutionally protected picketing and leafleting within view of DWHC. They have engaged in such activity on their own and not in concert with any of the original named defendants or anyone else. Petitioners were not parties to the original litigation, received no notice of those proceedings, were not served with the complaint and were not given an opportunity to be heard in those proceedings or a chance to present any individual defenses they had to the cause of action alleged by Respondents. Petitioners were not charged in the complaint with committing any torts against Respondents and there is no evidence that they have ever threatened to commit or have committed such torts. The first time Petitioners were brought into this case was on September 19, 1988, when Respondents filed contempt charges against the Petitioners. Those charges were refiled on January 20, 1989. Thus, prior to September 19, 1988, the Petitioners had no involvement in the litigation that resulted in the original injunction issued in this case.

Four of the Petitioners, Cheryl Sorrell, Marty DeLane, Mark Berry and Ron Severt, were acquitted of all the contempt charges brought against them. There is no evidence and no finding by the trial court that those Petitioners were legally associated with the original named defendants in the case. Nevertheless, the trial court issued an injunction against those Petitioners enjoining them from engaging in activity that is either lawful (*e.g.*, presence on public and private property around DWHC for the purpose of engaging in constitutionally protected activity), or when unlawful (e.g., blocking access to or trespassing upon DWHC), not conduct in which they have engaged.

Petitioner Tammy Silvey was convicted of contempt for: (1) conduct on September 13, October 7, and December 6, 1988, and January 17, 1989, involving picketing behind the building DWHC is in; (2) conduct on December 9, 1988 involving a violation of the injunction's number restriction; and (3) conduct on January 13 and April 29, 1989, involving picketing at the southwest side of the building DWHC is in. The first set of contempt citations for which Silvey was found guilty involved picketing on private property not owned by Respondents. Petitioners had been given express permission from the manager of the building behind DWHC to be on this property. Silvey's contempt conviction for violating the injunction's numbers restriction on December 9, 1988, involved an event where more than 200 persons were present at DWHC, but the event was peaceful and orderly. Except for the numbers violation, no other violations of the injunction or any other illegal activity occurred. Police were present, but no arrests were made. No one was prevented from entering DWHC, and no one was charged with blocking or interfering with traffic or making loud noise. DWHC had a party that day and its director told the press that DWHC's operations were not disrupted. Silvey's contempt convictions for conduct on January 13, 1989, and April 29, 1989, also involved Silvey's presence on property not owned by Respondents. There is no evidence in the record that the actual owner of this property objected to Silvey's presence on it.

In each instance where Silvey was convicted of contempt, she was otherwise engaged in peaceful constitutionally protected activity involving no tortious or criminal conduct. One of DWHC's patients, the only such patient to testify in any of the proceedings involving this matter, said Silvey "showed [her] a lot of care," "just wanted to help" her, and prayed with her. It is this type of constitutionally protected activity that the Respondents have succeeded in prohibiting.

During the contempt trial, it was established that: (1) Respondents were not harmed by peaceful picketing on any public property within view of DWHC; (2) Respondents were given permission by the owner of private property contiguous with DWHC to be present on that property (four of Tammy Silvey's contempt convictions were for being present on that

property); and (3) Respondents did not own the private property surrounding DWHC (although employees of DWHC go on that property). DWHC's director also conceded that the owners of the private property surrounding DWHC should have the right to protest DWHC's activities on their own property.

REASONS FOR GRANTING THE WRIT

The Ohio court has created law which is diametrically opposed to the U.S. Constitution and the settled precedents of this Court. This case involves an unprecedented, overbroad, content-based injunction imposed upon the Petitioners and a defendant class which is unconstitutional in that it restricts class members' speech based on whether that speech protests abortion. This injunction strips absent class members of their due process rights by adjudicating their rights without notice and without any opportunity to be heard and restrains otherwise lawful expressive activity in a public fora and on private property not owned or controlled by Respondents. Moreover, the injunction is not supported by any compelling state interest. By allowing the injunction to stand, Ohio's court of last resort has undermined the mandates of this Court issued in numerous decisions. This case is also unprecedented in that it involves a denial of absent defendant class members due process right to challenge the binding effect and constitutionality of an injunction issued against them in which they received no notice, made no appearance and were inadequately represented. Such an affront to the Constitution deserves this Court's attention.

I.

The permanent injunction directly contravenes the First Amendment guarantees of free speech and free assembly in that it is a content-based restriction on political speech in a public forum and is not narrowly tailored to serve a compelling state interest

This Court has consistently held that "peaceful picketing [is] expressive activity involving speech protected by the First Amendment." *U.S. v. Grace*, 461 U.S. 171, 176 (1983) (internal quotation marks and citations omitted). Furthermore, public streets and sidewalks are especially protected public fora for the purposes of the First Amendment which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Boos v. Barry*, 484 U.S. 312, 318 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). This Court has said that any attempts to restrict such activity in these fora are "very limited." *Id.* Any restriction must be content-neutral. *U.S. v. Grace* 461 U.S. 171 (1983).

The injunction in the instant case restricts picketing, leafleting or any form of expression or free speech activity (the trial court defines "picketing" so broadly that it includes "parading, parking, or any other form of demonstration" and "even goes to mere presence of a person") protesting abortion on the public sidewalks, streets, or easements within view of the DWHC.

These injunctive restrictions are not content-neutral. By its terms, the injunction enjoins only speech by those "protesting the activities conducted at . . . DWHC," only speech protesting abortion is prohibited. These restrictions would not apply to labor protests, civil rights marches, demonstrations against acid rain, and so forth, because such demonstrations would not involve persons who are protesting DWHC's activities. The injunction singles out pro-life speech for censure. Strictures on speech in such fora that occupy a "special position in terms of First Amendment protection" is unwarranted. *Boos* at 318. This

Court has held in *Police Department v. Mosley*, 408 U.S. 92, 96 (1972):

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views its finds acceptable, but deny use to those wishing to express less favored or more controversial views .... Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

By excluding only those who speak *against* abortion, the Ohio Courts have "grant[ed] to one side of a debatable public question . . . a monopoly in expressing its views." *United States v. Kokinda,* 110 S.Ct. 3112, 3125 (1990) (plurality) (internal quotation marks and citation omitted). In upholding this injunction, the Ohio Courts have rendered decisions in conflict with the precedents of this Court.

For example, this Court struck down a statute in *Boos v. Barry*, 484 U.S. 312, 318 (1988), laden with analogous constitutional infirmities.

The statute at issue in *Boos* prohibited picketing in protest of the government represented by the embassy within 500 feet of any foreign embassy. This Court struck down the anti-picketing statute as a content-based restriction unsupported by any compelling state interest. The injunction here, like the invalid statute in *Boos*, prohibits core First Amendment expression -- classic political speech. Time and again this Court has declared that such prohibitions are constitutionally unsound:

> We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be

> uninhibited, robust, and wide open," *New York Times v. Sullivan*, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964). . . . This has led us to scrutinize carefully any restrictions on public issue picketing.

Id. at 318.

The statute in *Boos* forbade picketing expressing a certain viewpoint. As this Court noted,

> Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, are permitted.

Id. at 318-19. Though the Respondents in *Boos* contended that the statute was content-neutral, this Court found otherwise.[5] This injunction far exceeds the restrictions struck down in *Boos*. The Ohio courts have gone beyond violating mere content-neutrality; they have extended their reach to exclude a disfavored viewpoint about abortion. See also *United States v. Grace*, 461 U.S. 171 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).[6]

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5. "Applying these principles to the case at hand leads readily to the conclusion that the display clause is content -based." *Boos* at 321.

6. In *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court struck down laws that prohibited picketing in public places but exempted certain labor picketing. These laws unconstitutionally "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Carey*, 447 U.S. at 460 (footnote omitted). A restriction based upon the speaker's point of view is even more patently unconstitutional. *See Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806, 812 (1985) (viewpoint discrimination is unconstitutional even in a non-public forum).

In the instant case the permanent injunction forbids:

1. Protesting or expressing a viewpoint critical of abortion anywhere within view of the DWHC except the public sidewalk in front of the clinic;

2. More than 10 persons from protesting or expressing a viewpoint contrary to abortion on that public sidewalk;

3. Only speech protesting abortion; and

4. Petitioners from being present on private property even with the owner's permission, if that property is within view of DWHC and if Petitioners express or hold a viewpoint critical of abortion.

The permanent injunction, however, permits individuals or groups to be present anywhere within view of DWHC to protest or discuss any other issues, or to picket in favor of abortion. Only the speech of those critical of abortion is prohibited or restricted.

Ruling on the statute in *Boos*, this Court cited *Perry Educators Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983), for the contention that content-based restrictions on speech in the public forum are valid only if they are necessary to serve a compelling state interest; further, they must be narrowly drawn to serve that interest. *Boos* at 321. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 238 (1984); *Califano v. Yamasaki*, 442 U.S. 682 (1979)

Such overbroad restrictions are anything but narrowly tailored. A law is narrowly tailored only "if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Because the injunction prohibits Petitioners and class members from being present at any location within view of

DWHC other than a small portion of the public sidewalk directly in front of DWHC, Petitioners and class members cannot:

1. Be on the public street, South Dixie Drive because it is within view of DWHC;

2. Be on the public easement on the west side of South Dixie Drive opposite DWHC; or

3. Be on the public sidewalk on the east side of South Dixie Drive except between the two driveways on either side of the building DWHC is in.

The injunction is not narrowly tailored to deal only with the "source of the evil" shown by Respondents because DWHC is not harmed by protesters being on public property at locations farther away from DWHC than the area permitted by the injunction. DWHC's director admitted that DWHC was not harmed when Petitioners and class members were on portions of the public sidewalk now designated as "out-of bounds" by the injunction.

The trial court's ban on residential presence is also overbroad because it sweeps within its ambit legal and constitutionally protected activity. The trial court has not limited the injunction to the traditional notion of "picketing," but has said that it includes the mere presence of a person, and has used problematic language forbidding presence that is "limited" to homes of DWHC patients and staff. The trial court chose not to mention the more specific language in *Frisby* about a residential ban being constitutional only if it prohibits traditional picketing activity taking place solely in front of a particular residence. 487 U.S. at 483. Because the trial court has not narrowed its ban to traditional picketing activity and because it appears that only general marching through an entire neighborhood is permitted, the injunction is overbroad. The ban on residential presence is also overbroad because it does not permit DWHC staff or

patients to give Petitioners or class members permission to be present at staff or patients' homes. *Id.* at 488.[7]

The only rights involved in this case are those of private parties - the DWHC, their staff or their patients. The Supreme Court of Ohio, without any compelling state interest at stake, failed to reverse an overbroad and vague injunction restricting the free speech of all persons who protest abortion in the public forum.

II.

The injunction violates the free speech and property rights of class members by enjoining them from engaging in constitutionally protected activity on private property

An injunction is overbroad when it restricts one from using private property that the owner has given the person enjoined express permission to use. *Gregory v. Sanders*, 635 P.2d 795, 802 (Wy.1981). *Cf. Frisby*, 487 U. S. 474, 488 (1988) (where this Court indicated that an ordinance restricting residential picketing may avoid an overbreadth problem when the picketer is at the home by invitation of a resident). The place restrictions of the injunction prohibit Petitioners and class members from being present on or visiting any residence or commercial establishment within view of DWHC for any purpose, even for constitutionally protected activity or legitimate business purposes, even if they are invited or own the property in question. Such restrictions are overbroad, particularly when Petitioners have been given permission to be on private property within view of DWHC.

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7. In his dissenting opinion, Justice Stevens said the law in *Frisby* on its face prohibited picketing even in front of the homes of willing recipients, which prohibition he said was unquestionably overbroad. 487 U.S. at 497, 499.

III.

The injunction violates the Due Process rights of absent class members by adjudicating their rights to free speech without notice of the underlying litigation or opportunity to be heard to present individual unique defenses before they are enjoined

One of the leading commentators on class actions, Herbert B. Newberg, has explained that, "due process requires that a fair opportunity to present unique defenses, by separate trials or otherwise, *must be afforded within the class action context before any defendant class member will be bound by any class judgment.*" 1 H. Newberg, Newberg on Class Actions Sec. 4.61 (2d ed. 1985) (emphasis added).

This Court has not addressed the issue of what constitutes notice for defendant class actions. This Court has provided some important guidance in its decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *Mullane* involved an action brought by a bank requesting review of its management of a trust fund in which thousands of individuals had an interest. The judgment foreclosed future claims of mismanagement. Pursuant to a New York statute, notice to defendants was provided by publication and a guardian was appointed to represent interests of defendants who did not appear. *Mullane* held that notice by publication, along with the appointment of a guardian to represent interests of non-appearing defendants, was insufficient to protect their due process rights without the best practical notice to each defendant. On its facts, *Mullane* could have been certified as a defendant class action. Petitioners submit that the holding of *Mullane* should be extended so that all defendant class members are notified of the underlying litigation and given an opportunity to be heard before they are bound by a court's decree.

That absent class members of a defendant class must be given notice of the action and an opportunity to present individual defenses *before they may be bound by a judgment involving the class* has been uniformly recognized. *E.g., Henson v. East Lincoln Township*, 814 F. 2d 410, 415 (7th Cir. 1987) *cert.*

granted, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987) (No. 87-5461) ("it would be odd if the rule permitted a defendant class without requiring notice"); *Kerney v. Ft. Griffin Fandangle Association, Inc.*, 624 F.2d 717, 721 (5th Cir. 1980) (members of a defendant class must "be given adequate notice of the action and an opportunity to present individual defenses"); *In re Gap Stores Security Litigation*, 79 F.R.D. 283, 291-92 (N.D. Cal. 1978) ("due process requires notice to each [defendant] class member"). *Cf. Phillips Petroleum v. Shutts*, 472 U. S. 797 (1985) (this Court has held that all absent plaintiff class members must be notified of the proceedings).

No attempt was made to provide absent class members with notice of the litigation or class certification hearing so that they could object or present individual defenses before a judgment was issued against them. In this case, potential class members were not given notice "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Instead, defendant class members are only required to be given a copy of the injunction at which time they are bound and their liberty is immediately curtailed.

The due process violations are even more egregious because the injunction restricts and threatens with contempt innocent non-parties whose only defining characteristic is that they have engaged in free speech activity protesting abortion. In *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 924 n.67 (1982), this Court specifically recognized that such innocent persons cannot be so enjoined. In sharp disregard of this clear precedent, the Ohio courts have assumed that parties who have committed no tortious acts and have no connection with the original named defendants may be bound by the injunction and held in civil contempt for allegedly violating it. That the persons so enjoined engaged in nothing more than constitutionally protected activities appears to be no defense.[8] The Ohio state

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8. When the underlying injunction is reversed, so must the citations for civil contempt. E.g., *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947); ("[t]he right to remedial relief [for civil contempt] fails with an injunction which events prove was erroneously issued"); *Matter of Campbell*, 761 F.2d 1181, 1185

courts have assumed that anyone's free speech may be enjoined if they are merely present and are perceived by DWHC staff members as sharing the viewpoints of the Petitioners regarding abortion.

The injunction also violates Petitioners' due process rights when it presumes "to make punishable the conduct of persons who act independently [from the parties] and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, (1945). Judge Learned Hand explained in *Alemite Manufacturing v. Staff*, 42 F.2d 832, 832-22 (2d Cir. 1930), why an injunction cannot bind non-parties who act independently: A court "is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it has personal service, and who therefore have their day in court." *Alemite* was followed by this Court in *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934), which held it to be error to extend an injunction to "all persons to whom notice of the injunction should come." This Court observed:

> [B]y extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law .... To subject them to such peril violates established principles of equity jurisdiction and procedure.

Id.

The injunction violates that standard because it purports to bind anyone served with it who protests DWHC's activity even

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(6th Cir. 1985); *ITT Community Development Corporation v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978). Because the trial court's injunction is unconstitutional and invalid with regard to Petitioner Tammy Silvey as set forth in this brief, the findings of civil contempt and all fines and awards of attorneys fees against Tammy Silvey must be reversed.

though they (1) are non-parties, (2) received no notice of the lawsuit, (3) did not have their day in court in a proceeding adjudicating their personal rights, and (4) act independently of the parties. The injunction, therefore, deprives such people of their liberty without affording due process of law.

IV

It is a violation of due process rights to preclude non-parties and absent class members from challenging the constitutionality of an injunction against them or an invalid defendant class certification on the basis of preclusion doctrines such as *res judicata*, collateral estoppel, or the "law of the case," and when the non-parties received no notice of the underlying litigation and were inadequately represented in it.

The Appellate Court refused to address the constitutionality of certain terms of the trial court's March 14, 1989 injunction or to review the propriety of the defendant class certification based on the "law of the case" doctrine set forth by the Supreme Court of Ohio in *Nolan v. Nolan*, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984). Applying the law of the case doctrine, or any preclusion doctrine, to the rights of the non-party Petitioners is inappropriate. Persons who were not parties to the original injunction lawsuit and class action hearings and who were not provided notice of the suit or of an opportunity to be heard cannot be precluded by doctrines of *res judicata* and collateral estoppel from challenging the validity of the class certification order and permanent injunction issued against them and the class. *Res judicata* and collateral estoppel apply only to parties and those legally identified with them. The Petitioners first appeared in this case in September 1988 when they were cited with contempt. There is no evidence that the Petitioners were class members on July 10, 1987 or at any time earlier or were ever given notice of the proceedings. There is no evidence that

the Petitioners are legally identified with the parties in this suit. Therefore, this Court's holding in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1970) is applicable:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

The Court cited *Hansberry v. Lee*, 311 U.S. 32 (1940), a class action case, for that proposition.

Thus, litigants, like the non-party Petitioners, who have never appeared or received notice of the prior action, who were not parties, who never had a chance to present their own evidence and arguments, and whose chosen representatives failed to file a timely appeal, thereby precluding full litigation or the arguments now on appeal, cannot be collaterally estopped.

Finally, the rules of *res judicata* and collateral estoppel as they apply to class action judgments establish that absent class members are only bound by a class judgment when at least three conditions are fulfilled: (1) the class was properly certified, (2) the interests of the absent class members were adequately protected throughout the class action proceedings, and (3) absent defendant class members were notified of the proceedings and afforded within the class action context an opportunity to present their own defenses. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Keene v. United States*, 81 F.R.D. 653 (S.D.W. Va. 1979); *Lewis v. Phillip Morris, Inc.*, 419 F. Supp. 354 (E.D. Pa. 1976).

In *Shutts*, *supra*, this Court set forth the minimum due process requirements for binding absent class members to a class action judgment:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314-15; *Cf. Isen v. Carlisle & Jacquelin*, 417 U.S. 15, 174-75 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interest of the absent class members.

Id. at 812. While the Court indicates that its decision is not necessarily dispositive of the due process concerns arising in a defendant class action (*Id.* at sec. 11 n.3), it is clear from *Shutts* that the due process concerns of a defendant class *are greater* than in a plaintiff class action. This Court stated: "Because states place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." *Id.* at 811. Commentators have recognized that implicit in the *Shutts* decision is the "idea that a more stringent test will be applied in determining the enforceability of an adverse judgment against absent defendant class members." 2 *Class Actions: Law and Practice sec. 23:05 (1987).*

The requirements of *Shutts* have not been satisfied in this action. Thus, the Petitioners, who never appeared in or received notice of the action, who never had a chance to present their own evidence and arguments, and whose chosen representatives failed to file a timely appeal, thereby precluding full litigation of the arguments now on appeal, cannot be collaterally estopped. *See Gonzales v. Cassidy* 476 F.2d 67, 76 (5th Cir. 1973) (a class

representative cannot be said to have "vigorously and tenaciously protected the interest of the class he was purporting to represent, or that all members of the class had been afforded due process of law by having a full day in court" when the class representative fails to prosecute a non-frivolous appeal on behalf of the class).

V

An injunction that imposes restrictions on otherwise lawful expressive activity in public places conflicts with the doctrine of prior restraint.

The Ohio courts upheld the speech-restrictive portions of the injunction at issue as reasonable time, place, and manner regulations. In so doing, the court pursued a course in clear conflict with the decisions of this Court applying the doctrine of prior restraint.

This Court has never approved of the use of injunctions as a vehicle for substantive legislation, *i.e.*, for defining new offenses. On the contrary, this Court has treated injunctions which impose substantive restrictions on free speech as presumptively unconstitutional prior restraints.[9] Nor has this Court ever applied time, place and manner analysis to injunctions that impose substantive restrictions on expressive activity. Rather, the Court has applied this test only to statutes, ordinances, and regulations.[10]

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9. *E.g., National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977) (per curiam)(injunction against marches and rallies); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne,* 393 U.S. 175 (1968) (court order restraining public rallies and meetings).

There are several reasons, reflected in the decisions of this Court, for disfavoring the use of substantive injunctions against free speech. These considerations principally reflect the wisdom of preserving the distinction between the lawmaking role of elected bodies and the adjudicative role of courts.

First, a statute or ordinance applies uniformly, while an injunction typically imposes special legal restrictions only upon a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment.[11] In the present instance, for example, protesters against CIA activities or the sale of non-union grapes are free to assemble as many participants as they can and anywhere they want (subject, of course, to general laws ensuring public order and unobstructed passage). Anti-abortion protesters, however, must limit their rallies, marches, and pickets to only ten participants and to only certain locations. Animal rights activists may carry signs that say "Honk if you love puppies," but pro-life picketers are forbidden to carry signs that say "Honk if you love babies." Such content-based restrictions on expressive activities in public places constitute "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (citation and quotation marks omitted).

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the alleged acts. *E.g., Walker v. Birmingham*, 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means

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10. *E.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations).

11. If the enjoined acts are already unlawful, the injunction does not define a new offense, but merely adds extra penalties. In such a case the order is remedial or procedural, not legislative or substantive.

of governance is repugnant to our system of republican form of government.

Third, the task of a court is to *weigh* a law, not to *draft* one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted. Courts refuse to rewrite unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place, or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property - here, parks]"); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protestors").

Fourth, judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council declines to enact a "bubble zone" requirement or a ten-person limit on marches or protests, a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to the courts. *Cf. New York Times Co., v. United States* 403 U.S. 713 (1942) (Marshall, J., concurring)(constitution does not provide for "government by injunction" in which courts may "make law"); *Id.* at 731; (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization").

The doctrine of prior restraint establishes a constitutional barrier to such abuse of the judiciary and resultant jeopardy to free speech rights. By evaluating the injunction at issue under the time, place, and manner standard applicable to

legislation, the court below ignored the strict constitutional safeguards designed to shield free speech from unconstitutional prior restraints.

This Court "has emphasized that a system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968) (internal quotation marks, brackets, and citations omitted). *See also FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990).

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84. In past decisions, this Court has consistently regarded an injunction that restricts expressive activity in public places as a prior restraint. *See supra* n. 10 (citing cases). The Ohio Court ignored these precedents in the case at bar.

CONCLUSION

If allowed to stand, the injunction in this case holds hostage federal constitutional rights, inhibiting the open and robust exchange of ideas. This cannot continue. State courts cannot ignore free speech rights in disregard of clear precedents.

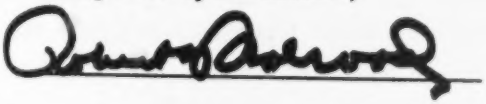
This case is unprecedented because the Ohio courts through a content-based injunction, which prohibits speech protesting abortion, have impermissibly (1) enjoined citizens from exercising their constitutionally protected rights, (2) bound absent class members who were not given notice of the

underlying litigation or an opportunity to present their unique defenses in that suit in violation of the requirements of due process, (3) denied the Petitioners the opportunity to challenge many aspects of the constitutionality of the injunction or the propriety of the class certification even in the light of inadequate representation by the court-designated class representatives.

The primary purpose of the injunction in question is to specifically prohibit the otherwise lawful expressive activity in public places in violation of the doctrine of prior restraint. The injunction also impermissibly restrains lawful activity on private property. It is an affront to our Constitution.

If the First Amendment is to have any force at all, it must protect free speech rights from being circumvented solely because the one seeking to exercise them does so within sight of those who disagree with the ideas expressed. That is precisely what this injunction seeks to do. It excludes from the public forum one voice and one voice only: that of the person protesting abortion. For these and the reasons previously cited, Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,



Of Counsel
THOMAS E. GROSSMANN
1800 Star Bank Center
Cincinnati, OH 45202
(513) 381-2838

TRACY LOUISE WINN
National Legal
Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242

Counsel of Record
ROBERT K. SKOLROOD
National Legal
Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242